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88-99

No.

In the Supreme Court of the United States

October Term, 1988

RONALD A. WILLIAMS,
Petitioner,

v.

DAVID A. HEPTING, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a trial witness is immune from a 42 U.S.C. § 1983 civil rights suit for pretrial acts including allegedly perjured testimony at preliminary and suppression hearings by operation of common law witness immunity—a question as to which the Courts of Appeals are split.

2. Whether a prosecuting attorney is absolutely immune from a 42 U.S.C. § 1983 civil rights suit for criminal acts by operation of absolute prosecutorial immunity as set forth by this Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976).

3. Whether the Appellate Court of Appeals' "limited exhaustion formula" which requires a plaintiff to conclude his state court criminal proceedings before proceeding with his civil claims for damages is in conflict with this Court's holding in *Preiser v. Rodriguez*, 411 U.S. 475 (1973) that a civil rights plaintiff is not required to exhaust state remedies before pursuing his federal lawsuit for damages.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Ronald A. Williams, and Respondent David A. Hepting. Chief Scarfo, Lieutenant J. F. Widdowson, Corporal Schueler, Officer Lewis, Officer Hartman, Robert F. Stewart, Gary Archer and Paul Bowser, Jr. are also respondents in the proceedings below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. The Court Of Appeals' Decision Extending The Scope Of Trial Witness Immunity To Pretrial Testimony Conflicts With Two Other Courts of Appeals' Decisions Limiting Such Immunity To Testimony At Trial	6
II. The Court Of Appeals' Decision Recognizing Absolute Prosecutorial Immunity For Alleged Criminal Acts By The Prosecuting Attorney Is Inconsistent With This Court's Reasoning On Other Immunity Questions And Decisions By Other Courts Of Appeals	10
III. The Court Of Appeals' Decision To Stay The Proceedings On Petitioner's Claims For Damages Until His State Court Appeal Is Concluded Is Inconsistent With This Court's Decision In *Preiser v. Rodriguez*, 411 U.S. 475 (1973)	14
CONCLUSION	17

TABLE OF AUTHORITIES

Page

Anthony v. Baker,
767 F.2d 657 (10th Cir. 1985) 7

Board of Regents v. Tomanio,
446 U.S. 478 (1980) 16

Briggs v. Goodwin,
569 F.2d 10 (D.C. Cir. 1977), *cert. denied,*
437 U.S. 904 (1978) 13

Briggs v. Goodwin,
712 F.2d 1444 (D.C. Cir. 1983),
cert. denied, 464 U.S. 1040 (1984) 7, 8, 9, 12

Briscoe v. LaHue,
460 U.S. 325 (1983) . . . . . *passim*

Cleavinger v. Saxner,
474 U.S. 193 (1985) 11

Collins v. Walden,
613 F.Supp. 1306 (N.D. Ga. 1985), *aff'd mem.,*
784 F.2d 402 (11th Cir. 1986) 8

Imbler v. Pachtman,
424 U.S. 409 (1976) 10, 13, 14

Juidice v. Vail,
430 U.S. 327 (1977) 15

Kincaid v. Eberle,
712 F.2d 1023 (7th Cir.), *cert. denied,*
464 U.S. 1018 (1983) 7, 8

Krohn v. United States,
742 F.2d 24 (1st Cir. 1984) 7, 13

Macko v. Byron,
760 F.2d 95 (6th Cir. 1985) 7

Page

Mitchum v. Foster,
407 U.S. 225 (1972). 16

Patsy v. Board of Regents,
457 U.S. 496 (1982) 15, 16

Preiser v. Rodriguez,
411 U.S. 475 (1973) 14, 15

San Filippo v. U.S. Trust Co. of New York,
737 F.2d 246 (2d Cir. 1984), *cert. denied*,
470 U.S. 1035 (1985) 7, 8

Smith v. Updegraff,
744 F.2d 1354 (8th Cir. 1984) 13

Sprecher v. Graber,
716 F.2d 968 (2d Cir. 1983) 8

Tower v. Glover,
467 U.S. 914 (1984). 15

United States v. Kubrick,
444 U.S. 111 (1979). 17

Wheeler v. Cosden Oil & Chemical Co.,
734 F.2d 254 (5th Cir.),
modified on different grounds,
744 F.2d 1131 (5th Cir. 1984) 7, 8

STATUTES AND OTHER AUTHORITIES

U.S. Constitution, First Amendment 3
U.S. Constitution, Fourth Amendment 3
U.S. Constitution, Fifth Amendment 3
U.S. Constitution, Sixth Amendment 3
U.S. Constitution, Eighth Amendment 3
U.S. Constitution, Fourteenth Amendment 3
28 U.S.C. § 1254(1) 2

Page

42 U.S.C. § 1981 3
42 U.S.C. § 1983 ..... passim
42 U.S.C. § 1985 3
42 U.S.C. § 1986 3
Fed. R. Civ. P. 26 16
Fed. R. Civ. P. 37 16
42 Pa.C.S.A. § 4583 (Purdon's 1981) 11
61 P.S. § 2121 (Purdon's 1964 and Supp. 1988) 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Ronald A. Williams, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on April 18, 1988.

OPINIONS BELOW

The April 18, 1988 Opinion of the United States Court of Appeals for the Third Circuit, as amended, is reported at 844 F.2d 138 (3d Cir. 1988) (amended opinion appears in hard bound edition of 844 Federal Reporter only), and is reprinted in Appendix A hereto at page 1a.

The Memorandum Order of the United States District Court for the Western District of Pennsylvania is unreported, and is reproduced in Appendix B at page 20a.

The U.S. Magistrate's Report and Recommendation, which was adopted by the district court in its Memorandum Order, is unreported and is reproduced in Appendix C at page 24a.

JURISDICTION

On April 18, 1988, the United States Court of Appeals for the Third Circuit issued its order affirming in part and remanding in part the district court's Memorandum Order granting defendants' motions to dismiss.

Jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983 (1981) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Ronald A. Williams ("Williams") is a black male currently in the custody of the Commonwealth of Pennsylvania pursuant to his conviction, based on complicity law, for first degree murder. As a result of his conviction, he was sentenced to death by the Common Pleas Court of Butler County, Pennsylvania on June 27, 1985 pursuant to the provisions of 61 P.S. § 2121 (Purdon's 1964 and Supp. 1988).

On August 13, 1986, Williams filed a *pro se* Complaint in the United States District Court for the Western District of Pennsylvania pursuant to 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Williams' alleged various violations of his civil rights, including jury-tampering by the assistant district attorney of Butler County, Pennsylvania who prosecuted his criminal case, perjured testimony at preliminary and suppression hearings by the trial witness who eventually testified that he saw Williams at the scene of the crime thereby substantively altering his former statements under oath, failure to investigate by five police officers and the district attorney and a conspiracy to violate Williams' civil rights among all of the aforementioned actors as well as two jurors. Williams' Complaint and the ensuing pleadings from various Defendants were referred to the U.S. Magistrate.

On March 27, 1987, the U.S. Magistrate issued a Report and Recommendation, recommending, *inter alia*, that most of Williams' claims against the state assistant district attorney should be dismissed on the basis of absolute prosecutorial immunity and that all Williams' claims against the trial witness should be dismissed on the basis of

witness immunity. Further, the U.S. Magistrate recommended that Williams' claims for failure to investigate against certain police officers and the assistant district attorney be dismissed without prejudice until the conclusion of Williams' state court conviction proceedings, which at that point were before the Pennsylvania Supreme Court for automatic review.

On May 6, 1987, the United States District Court for the Western District of Pennsylvania adopted the U.S. Magistrate's Report and Recommendation, on the condition that named Defendants execute statute of limitations waivers for the claims dismissed without prejudice. In so doing, the district court denied Williams' April 17, 1987 motion to amend his Complaint.

In its April 18, 1988 Opinion, as amended on May 24, 1988, a panel of the United States Court of Appeals for the Third Circuit upheld the dismissal of claims against the trial witness on the basis of immunity, stating:

> Our task here is to decide if the *Briscoe [v. LaHue*, 460 U.S. 325 (1983)] teaching may be extended to statements made by witnesses prior to trial. Although the Supreme Court has not decided "the question of immunity for testimony at pretrial proceedings," *id* at 329 n.5, [103 S.Ct. at 1112 n.5,] seven years before the *Briscoe* holding we extended the concept of common law witness immunity to a witness appearing in federal court. *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976).
>
> * * *
>
> We think that these policy arguments [cited by the Court of Appeals in *Brawer*] support the extension of the absolute immunity doctrine to a witness at the pretrial stage of the judicial process.

844 F.2d at 141; slip op. at 7-8 (A.8a-9a).

The Court of Appeals further upheld the dismissal of claims against the assistant district attorney on the basis of prosecutorial immunity, stating:

> We have considered the remaining contentions raised by appellant and do not believe that the district court's treatment of them amounted to reversible error, *viz*, . . . that [the district court] erred in applying the teachings of *Imbler v. Pachtman*, 424 U.S. 409[, 96 S.Ct. 984, 47 L.Ed. 2d 128] (1976), to the actions of prosecutor Hepting . . . .

844 F.2d at 145; slip op. at 16 (A.17a).

Finally, the Court of Appeals remanded Williams' claims against five police officers and the assistant district attorney for failure to investigate to the district court with directions that it amend its order to provide that consideration of these issues, originally dismissed without prejudice, be stayed pending the outcome of Williams' state court proceeding. 844 F.2d at 145; slip op. at 16 (A.17a). The Court of Appeals explained the stay as one pursuant to a "limited exhaustion requirement when a civil rights damages action challenges the fact of confinement by attacking the underlying criminal conviction that caused the confinement." 844 F.2d at 144; slip op. at 13 (A. 14a).

On May 27, 1988, the Third Circuit stayed the issuance of the mandate in this case until June 8, 1988 upon Petitioner's representation of an intention to file the instant petition for writ of certiorari with this Court. Issuance of the mandate was further stayed on motion from Petitioner until July 8, 1988.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals' Decision Extending The Scope Of Trial Witness Immunity To Pretrial Testimony Conflicts With Two Other Courts of Appeals' Decisions Limiting Such Immunity To Testimony At Trial.

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court held that witnesses who testify at trial obtain absolute immunity from damages liability based on that testimony.

In footnote 5 of the *Briscoe* opinion, however, the Court stated:

> The petition for writ of certiorari presents the following questions: "Whether a police officer who commits perjury during a state court criminal trial should be granted absolute immunity from civil liability under 42 U.S.C. § 1983." Pet. for Cert. i. The petition does not raise the question of immunity for testimony at pretrial proceedings such as probable-cause hearings, nor does petitioners' brief discuss whether the same immunity considerations that apply to trial testimony also apply to testimony at probable-cause hearings. We therefore do not decide whether respondent LaHue is entitled to absolute immunity for allegedly false testimony at two probable-cause hearings regarding petitioner Briscoe.

Id. at 329 n.5. The Court in *Briscoe*, therefore, left unresolved the question of whether a witness is entitled to absolute immunity from damages arising from his pretrial testimony.

This case directly presents the Court with an opportunity to address that issue left unresolved by *Briscoe:* Whether a witness is entitled to absolute immunity for testimony at proceedings prior to the trial phase. This open

question has generated a growing number of conflicting decisions among the Courts of Appeals.

In this case, the Third Circuit's decision that absolute immunity extends to witnesses for their acts of presenting allegedly perjured testimony at preliminary and suppression hearings is in direct conflict with decisions of the United States Courts of Appeals for the Fifth and Tenth Circuits. *Anthony v. Baker*, 767 F.2d 657, 663 (10th Cir. 1985); *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, 261 (5th Cir.), *modified on different grounds*, 744 F.2d 1131 (5th Cir. 1984). *See also Krohn v. United States*, 742 F.2d 24 (1st Cir. 1984) (no absolute immunity for police officer swearing out probable cause affidavit to Magistrate for purposes of obtaining arrest warrant).

In refusing to extend witness immunity to pretrial acts, the Fifth and Tenth Circuits have relied upon this Court's caveat in footnote 5 in *Briscoe,* interpreting it as judicial restraint on the part of this Court and as meaning that this Court did not intend to create witness immunity for pretrial acts where none had existed before. *Cosden*, 734 F.2d at 261; *Anthony v. Baker*, 767 F.2d at 663.

On the other side of the conflict, along with the Third Circuit's recent decision, the United States Courts of Appeals for the Second, Sixth, Seventh and District of Columbia Circuits have extended *Briscoe* immunity to witnesses in various pretrial hearings. *San Filippo v. U.S. Trust Co. of New York*, 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985) (absolute immunity for grand jury witness); *Macko v. Byron*, 760 F.2d 95 (6th Cir. 1985) (absolute immunity for grand jury witness); *Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir.), *cert. denied*, 464 U.S. 1018 (1983) (absolute immunity for grand jury witness); *Briggs v. Goodwin*, 712 F.2d 1444 (D.C. Cir. 1983), *cert.*

denied, 464 U.S. 1040 (1984) (absolute immunity for grand jury witness). Additionally, the United States Court of Appeals for the Eleventh Circuit has gone one step further by recently affirming the application of the *Briscoe* rule to a witness who "testifies" by sworn affidavit, even where such "testimony" is knowingly false and malicious. *Collins v. Walden*, 613 F.Supp. 1306, 1314 (N.D. Ga. 1985), *aff'd mem.*, 784 F.2d 402 (11th Cir. 1986). *See also, Sprecher v. Graber*, 716 F.2d 968, 975 (2d Cir. 1983) (SEC official immune from civil damages liability for swearing to false and perjurious statements in affidavit submitted as part of SEC investigation).

These Courts of Appeals have based their extension of absolute immunity on the theory that the threat of a suit for damages will have a chilling effect on those witnesses who otherwise would come forward to testify. *San Filippo*, 737 F.2d at 256; *Kincaid*, 712 F.2d at 1024; *Briggs*, 712 F.2d at 1448; *Collins*, 613 F. Supp. at 1314.

This conflict is an explicit one among the circuits and, therefore, has generated substantial dialogue among them. The Fifth Circuit in *Cosden* made the following attack on jurisdictions extending *Briscoe* immunity to pretrial settings:

> We note that two circuits have extended *Briscoe* to create immunity for state officers' testimony at grand jury proceedings. See *Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir.) (per curiam), *cert. denied*, ___ U.S. ___, 104 S.Ct. 551, 78 L.Ed.2d 725 (1983); *Briggs v. Goodwin*, 712 F.2d 1444 (D.C. Cir. 1983) (per curiam). We are not persuaded by these opinions; they are cursory in the extreme, *see Kincaid*, 712 F.2d at 1024 (Cudahy, J. concurring) (impropriety of deciding issue on the basis of 9-page *pro se* brief and without oral argument), and

> in our view they inadvisedly extend *Briscoe* beyond the intrinsic limitations of its basis in the common law.

734 F.2d at 261 n.16.

Likewise, in the instant case the Third Circuit rebutted:

> Yet, we are aware that other courts have refused to extend witness immunity to the pretrial setting. *See Anthony v. Baker*, 767 F.2d 657, 663 (10th Cir. 1985) (*Briscoe* does not afford absolute immunity for testimony before grand jury); *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, 261 (5th Cir.) (absolute immunity does not extend to testimony of state official at probable cause hearing), *modified on different grounds*, 744 F.2d 1131 (5th Cir. 1984).
>
> But we do not find the rationales underlying these cases to be persuasive.

844 F.2d at 143; Slip. Op. at 11 (A.11a-12a).

This sharp division on the important and recurring question of the perimeter of witness immunity requires the attention of this Court for resolution. As observed by Judge Bazelon in *Briggs v. Goodwin, supra*, the ramifications of this decision impact not only on the remedies available to the civil rights litigant but also on the integrity of the American criminal justice system. *Briggs*, 712 F.2d at 1449 n.36. As such, it raises an important policy question which should be resolved by this Court and applied consistently by the United States Courts of Appeals.

Of the seven circuits discussed above, five have held that a witness testifying in a pretrial setting is absolutely immune from damages liability for civil rights violations. Two have held directly to the contrary, on the basis of

Briscoe's express reservation. Only this Court can resolve this direct conflict.

II. The Court Of Appeals' Decision Recognizing Absolute Prosecutorial Immunity For Alleged Criminal Acts By The Prosecuting Attorney Is Inconsistent With This Court's Reasoning On Other Immunity Questions And Decisions By Other Courts Of Appeals.

This Court traced the common law origins of prosecutorial immunity in *Imbler v. Pachtman*, 424 U.S. 409 (1976), and, after weighing the public policy considerations underlying Section 1983, concluded:

> [The] respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. . . .We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.

Id. at 430-31 [footnote omitted]. The Court also expressly excluded from the scope of absolute immunity a prosecutor's acts which, by their functional nature, are more akin to the investigative activities of a policeman. *Id.* at 430.

The Court did not indicate by its language, nor does its reasoning suggest, that investigative activities are the only acts a prosecutor may commit which would fall outside the prosecutorial function and, hence, outside the scope of absolute immunity. Rather, the Court's meaning was clear: When acting *within the scope of his or her prosecutorial duties*, a prosecuting attorney is absolutely immune from a civil suit for damages under § 1983. Otherwise, the prosecutor can claim only limited, qualified immunity as his or her shield.

In *Cleavinger v. Saxner*, 474 U.S. 193 (1985), this Court outlined the concerns raised by a grant of absolute immunity:

> Absolute immunity flows not from rank or title or "location within the Government," *Butz v. Economou*, 438 U.S., at 511, but from the nature of the responsibilities of the individual official. And in *Butz* the Court mentioned the following factors, among others, as characteristic of the judicial process and to be considered in determining absolute as contrasted with qualified immunity: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. *Id.*, at 512.

Cleavinger, 474 U.S. at 201-02.

Clearly, an individual does not automatically receive the shield of absolute immunity because he holds the office of prosecutor. Moreover, application of these factors strongly suggests that qualified immunity, at most, should be afforded to prosecutors who violate criminal statutes under the guise of prosecutorial function. There is no legitimate need for prosecutors to have access to criminal means to perform their duties.[1] The presence of effective safeguards in the system to combat the occurrence of illegal acts by prosecutors is questionable where any criminal

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[1]The Pennsylvania Code provides that discussing a case with a juror with intent to influence that juror is a misdemeanor of the second degree. 42 Pa. C.S.A. § 4583 (Purdon's 1981).

charges must be brought and prosecuted by fellow prosecutors or, in some situations, subordinate prosecutors in the same office. Judge Bazelon of the United States Court of Appeals for the District of Columbia voiced this very concern in *Briggs v. Goodwin*, 712 F.2d 1444 (D.C. Cir. 1983).

In *Briggs*, the United States Court of Appeals for the District of Columbia faced a case where a prosecuting attorney had perjured himself on the witness stand in a grand jury proceeding. There the court extended absolute immunity to the prosecutor on the basis of witness immunity but noted:

> While upholding appellee's absolute immunity claim, we note our deep concern. The allegations in this case painfully illustrate the significant costs of this holding -not only to the appellant, but to the integrity of our criminal justice system as well. As the state's lawyer and an officer of the court, a prosecutor has a special obligation to discharge his duties lawfully and fairly. In this case, appellant claims that a prosecutor perjured himself from the witness stand during a criminal investigation. Our response to appellant's claim is that a civil damages action, whatever its merits, may not be pursued against the prosecutor. Instead, appellant must rely on the possibility of a prosecution of the prosecutor by his fellow prosecutors. We find it troubling that our system of justice, which rests so fundamentally on the consent of the governed, offers such inadequate remedies for official violations of individuals' constitutional rights.

712 F.2d at 1449 n.36. The same concerns are relevant where a prosecutor claims absolute prosecutorial immunity.

Clearly, denying absolute immunity to prosecutors who commit criminal acts is consistent with the policy underlying Section 1983 and this Court's precedent in that it would not "prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Imbler*, 424 U.S. at 427-28. To the contrary, it would encourage prosecutors to abide by the very system they are sworn to enforce.

The instant decision by the Third Circuit is inconsistent with this Court's precedent. Moreover, the application of this precedent by other United States Courts of Appeals presented with claims of alleged criminal activity by prosecutors has been inconsistent.

For instance, in *Smith v. Updegraff*, 744 F.2d 1354 (8th Cir. 1984), the Eighth Circuit held that a prosecutor's attempts to frame the plaintiff as well as his illegal threats to prosecute the plaintiff constituted activity beyond prosecutorial duties. The Court held that absolute immunity does not extend to "conduct clearly beyond the scope of [the prosecutor's] authority and wholly unrelated to his role as an advocate." 744 F.2d at 1364. In *Briggs v. Goodwin*, 569 F.2d 10 (D.C.Cir. 1977), *cert. denied*, 437 U.S. 904 (1978), the United States Court of Appeals for the District of Columbia found that a prosecutor who knowingly took the stand and testified in an untruthful manner, thereby committing perjury, was not performing acts entitled to prosecutorial absolute immunity. In that case, the prosecutor was granted only qualified immunity. *Id.* at 16.

On the other hand, the First Circuit in *Krohn v. United States*, 742 F.2d 24 (1st Cir. 1984), expressly held that a prosecutor's use of illegal means to achieve a conviction is

irrelevant and not sufficient to remove such acts from the scope of his prosecutorial authority. *Id.* at 30.

As in witness immunity situations, decisions by the courts on prosecutorial immunity are "all over the board" and require the guidance of this Court to resume a consistent and reliable approach. The scope of absolute prosecutorial immunity raises an important policy question which this Court should address. While the policy behind this Court's extension of absolute immunity of *Imbler v. Pachtman* was the protection of the judicial process, 424 U.S. at 439, extending such immunity mechanically to *any* act performed by a prosecutor, albeit criminal, ignores the need for protection of individual constitutional rights when a prosecutor has overstepped the bounds of his authority. Only this Court can restore that protection of individual rights.

III. The Court Of Appeals' Decision To Stay The Proceedings On Petitioner's Claims For Damages Until His State Court Appeal Is Concluded Is Inconsistent With This Court's Decision In *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

Similar to *Preiser v. Rodriguez*, the instant case presents a question of considerable practical importance: whether a civil rights plaintiff, prior to the final disposition of his criminal appeal in the state forum, can invoke the jurisdiction of a federal court by seeking relief on his civil damages claims which arise from the circumstances surrounding his state criminal conviction.

This Court has had occasion to note hypothetically that abstention concerns arise where a plaintiff pursues a Section 1983 suit for damages stemming from an unlawful conviction prior to collateral exhaustion of state court

attacks on the conviction itself. *Tower v. Glover*, 467 U.S. 914, 923 (1984); *Juidice v. Vail*, 430 U.S. 327, 339 n.16 (1977). This Court has never directly addressed the issue, however.

On the other hand, this Court has stated that the form of relief sought by the plaintiff determines whether he can proceed on his civil rights claims:

> If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, *a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.*

Preiser v. Rodriguez, 411 U.S. 475, 494 (1973) (emphasis added) (citation omitted). By requiring Williams to exhaust his state criminal appeals before pursuing his federal claims for damages, the Court of Appeals' holding in the instant case to stay Williams' federal civil case until he has concluded his state criminal appeal clearly runs counter to this Court's holding in *Preiser*.

The Court of Appeals' decision in the instant case is also contrary to this Court's holding in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), wherein this Court held that Section 1983 contains no requirement that a claimant exhaust available state judicial or administrative remedies as a condition precedent to invoking federal judicial relief. *Id.* at 516. In so doing, this Court noted that "this Court

has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position ...." *Id.* at 500-01.

In *Patsy*, this Court held that any exhaustion formula adopted by the courts must be consistent with the legislative intent behind the statute in question. *Id.* at 501-02. On its face, Section 1983 contains no exhaustion requirement. Moreover, the purpose of Section 1983 is to interpose federal courts between the states and the people to act as guardians of a citizen's rights. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Therefore, imposing on Williams the requirement that he exhaust his criminal proceedings in state court before pursuing his civil claims runs counter to the legislative intent underlying Section 1983 relief.

By admitting that Williams' claims are viable but staying them, the Court of Appeals in the instant case has denied to Williams the speedy review which is essential to effective redress. It is a fundamental principle of the American legal system that a civil plaintiff is permitted timely discovery in order to preserve evidence. Fed.R.Civ. P. 26, 37. In fact, legislatures adopt and the courts strictly enforce statutes of limitations due to a well-established public policy of forcing plaintiffs to bring their claims promptly while the evidence and witnesses are available, thereby enhancing the reliability of the justice system. *See, e.g., Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) ("The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh.").

Here, over three years have passed since the events which Williams alleges in his Complaint occurred. Requiring Williams to wait for final disposition of his criminal

appeal in state court forces him to risk the loss of *any* recovery on his civil claims because, as this Court has stated, "the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted).

The importance of this question cannot be overstated, as it impacts directly on every state-convicted individual who suffers an alleged civil rights violation during state proceedings. If the federal courts are to impose any exhaustion requirement on these constitutional rights, this Court must address the resulting tension between an individual's right to redress and the principles of federalism.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court Of Appeals

FOR THE THIRD CIRCUIT

No. 87-3333

RONALD A. WILLIAMS, P-8467
Appellant

vs.

DAVID A. HEPTING, Assistant District Attorney; CHIEF SCARFO; LT. J. F. WIDDOWSON; CPL. SCHUELER; OFFICER LEWIS; OFFICER HARTMAN; ROBERT F. STEWART; GARY ARCHER; PAUL BOWSER, JR.

Appeal from the United States District Court for the Western District of Pennsylvania

(D.C. Civil No. 86-1715)

Submitted under Third Circuit Rule 12(6)
March 9, 1988

Before: WEIS*, GREENBERG and ALDISERT
Circuit Judges.

(Filed April 18, 1988)

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* The Honorable Joseph F. Weis, Jr. was an active judge at the time this appeal was decided. He has now assumed senior status.

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

In this appeal from the dismissal of a civil rights suit brought by a prisoner, the major question for decision is whether a witness who testifies at a preliminary hearing is entitled to absolute immunity from a subsequent civil rights suit for damages based on allegedly perjured testimony given at those proceedings. We must also decide whether the district court properly abstained from adjudicating certain civil rights claims which, in essence, seek to attack the validity of a state court conviction, while an appeal of that conviction remains pending in state court.

I.

On the evening of August 5, 1984, Archie S. Bradley was shot to death at the Norsub Trucking Company parking lot in Cranberry Township, Butler County, Pennsylvania. An investigation ensued, resulting in the indictment of Ronald A. Williams and Raymond Williams for first degree murder. On January 24, 1985, a Butler County Common Pleas jury found Ronald Williams and Raymond Williams guilty of first degree murder, and subsequently sentenced them to death. Pursuant to 42 Pa. Cons. Stat. §§ 722(4), 9711(h), the Pennsylvania Supreme Court took an automatic review of both Raymond and Ronald Williams' convictions and death sentences. The court affirmed Raymond Williams' conviction, but overturned his death penalty sentence. *Pennsylvania v. Raymond Williams,* 522 A.2d 1058 (Pa. 1987). The court has not yet ruled on Ronald Williams' appeal, but instead has

remanded the case to the Butler County Court of Common Pleas for further evidentiary hearings.

On August 13, 1986, Ronald Williams, now a prisoner incarcerated in a state facility, filed this civil rights action under 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988. His *pro se* complaint set forth a web of constitutional offenses linked to the alleged failure to properly investigate his case, falsification and concealment of evidence, subornation and commission of perjury, and clandestine tampering with members of the jury. As relief, Williams sought compensatory and punitive damages.

A.

Williams alleged that his constitutional rights were violated by a Butler County assistant district attorney, five Cranberry Township police officers, a prosecution witness, and two members of a Butler County jury during the course of the state criminal investigation and prosecution that resulted in his first degree murder conviction and death sentence. He also alleged that David Hepting—a Butler County assistant district attorney—conspired with defendants Scarfo, Widdowson, Schueler, Hartman, and Lewis—Cranberry Township police officers—to "create" the necessary evidence to sustain a murder case against Williams.

Williams said that the defendants conspired against him because he was an ex-felon, black, and believed by the defendants to be guilty. In furtherance of the conspiracy, Hepting, Scarfo, Widdowson, and Schueler allegedly convinced defendant Robert Stewart to falsely identify Williams as the driver of a car that police chased from the scene of the murder on August 5, 1985, and to falsely

testify at Williams' preliminary and suppression hearings and trial.

Williams alleged that Hepting and the police officers suppressed exculpatory evidence from their investigation, namely, a handwritten note that related to the scene of the murder. Defendants Hepting, Schueler, Widdowson, and Scarfo, who retained possession of the note as well as samples of Williams' handwriting, allegedly knew that the note handwriting differed from his writing exemplar and that Williams, therefore, could not have prepared the note. Williams charged that the defendants ceased investigating this line of inquiry to deprive him of exculpatory evidence.

He also charged Hepting with concealing evidence about the handwriting exemplars at trial and subsequently stating that the samples and police reports concerning the handwriting investigation did not exist. After Williams' trial, however, Hepting produced the exemplars and reports by order of court. Finally, Williams claimed that Hepting secretly informed defendants Archer and Bowser, two jurors at trial, of Williams' past criminal record in order to prejudice the jury's verdict and obtain a conviction. Archer and Bowser allegedly informed the remaining jurors of Williams' past criminal record prior to the verdict and, according to the plaintiff, persuaded the jury to find Williams guilty. A hearing conducted later by the trial court, however, determined that no jury tampering had occurred.

B.

The defendants responded to Williams' complaint by filing a Rule 12(b)(6), F.R. Civ. P., motion to dismiss. The

district court, adopting the recommendations of the magistrate, granted defendants' motion. The district court determined that prosecutorial immunity applied to Williams' allegations against Hepting, and the witness immunity applied to Williams' allegations against Stewart for his testimony at plaintiff's pretrial hearings and trial.

The court, however, dismissed two claims without prejudice, enabling Williams to refile those claims in federal court after first pursuing them in state court: (1) Williams' allegation that Hepting, Schueler, Scarfo, and Widdowson deliberately failed to investigate an aspect of plaintiff's case because of his race; and (2) his contention that Schueler, Scarfo, and Widdowson induced witness Stewart to falsely identify Williams by arranging a suggestive encounter between the defendant and Stewart shortly before Williams' preliminary hearing.

In ruling on defendants' 12(b)(6) motion, the district court denied Williams' request to file an amended complaint. Williams appeals from the district court's dismissal of his complaint.

II.

On review of the district court's dismissal of plaintiff's complaint, this court must take all of the well-pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any circumstances, the plaintiff might be entitled to relief. *Rogin v. Bensalem Twp.*, 616 F.2d 680, 685 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981); *see Conley v. Gibson*, 355 U.S. 41 (1957).

III.

We turn first to the issue of witness immunity. In his complaint, Williams alleged that witness Robert Stewart deliberately lied while testifying at plaintiff's preliminary hearing, the suppression hearings, and at trial. The district court dismissed Williams' claim against Stewart based on the doctrine of absolute witness immunity. On appeal, Williams does not challenge the district court's decision regarding Stewart's testimony at trial. Williams contends, however, that the district court erred in granting Stewart absolute immunity for his testimony at the pretrial hearings.

A.

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the Supreme Court held that a convicted defendant could not state a claim for damages under 42 U.S.C. § 1983 against a police officer who had allegedly given perjured testimony at the defendant's criminal trial. The Court anchored its ruling on the absolute immunity accorded at common law to witnesses in judicial proceedings, which was based on the need "to avoid intimidation and self-censorship." *Id.* at 341-42. Section 1983, the Court explained, "did not abrogate the absolute immunity existing at common law." *Id.* at 334. In reaching its decision, the Court stressed that a functional analysis governs absolute immunity issues, not the status of an individual. *See also Butz v. Economou*, 438 U.S. 478, 511-12 (1978); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981). It noted that the police officer was entitled to immunity not because of his position in law enforcement, but because he testified as a witness in a judicial proceeding. "A police officer on the witness stand performs the

same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions on direct examination and cross-examination, and may be prosecuted subsequently for perjury." *Briscoe*, 460 U.S. at 342.

Our task here is to decide if the *Briscoe* teaching may be extended to statements made by witnesses prior to trial. Although the Supreme Court has not decided "the question of immunity for testimony at pretrial proceedings," *id.* at 329 n.5, seven years before the *Briscoe* holding we extended the concept of common law witness immunity to a witness appearing in federal court. *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976).

It is appropriate to review the reasoning we expressed in Brawer to determine its applicability to the issue presently before us. We emphasized that common-law witness immunity extends back to Lord Mansfield's comprehensive 1772 formula: "Neither party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally for words spoken in office." *See* Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 474 (1909). While on the New York Court of Appeals, Cardozo embraced Lord Mansfield's formulation; Augustus Hand described it as "practically the universal rule in this country." *See Sacks v. Stecker*, 60 F.2d 73, 75 (2d Cir. 1932). *See generally* 1 F. Harper & F. James, *The Law of Torts* § 5.22, at 423-26 (1956). Witness immunity is firmly bottomed in public policy:

> The function of witnesses is fundamental to the administration of justice. The court's judgment is based on their testimony and they are given every encouragement to make a full disclosure of all pertinent information within their knowledge. . . . "[E]very

> consideration of public policy requires that they should be as fearless in testifying as the judge and jury are independent in weighing their testimony."

Brawer, 535 F.2d at 837 (citations omitted). We think that these policy arguments support the extension of the absolute immunity doctrine to a witness at the pretrial stage of the judicial process.

The overreaching considerations have been expressed in *Butz v. Economou*, 438 U.S. 478, 512 (1978):

> The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the *Bradley [v. Fisher]* Court suggested, 13 Wall. [335, 348-49 (1872)], controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson v. Ray*, 386 U.S. [547, 554 (1967)]. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

Support for extending this policy to witness statements made prior to trial appears to be universal. In *Holt v. Castaneda*, 832 F.2d 123, 125 (9th Cir. 1987), the court noted:

> In adversarial pretrial proceedings, as in trials, the witness testifies in court, under oath, under the supervision of the presiding judge and is subject to criminal prosecution for perjury.

Witnesses at trial are afforded absolute immunity to encourage complete disclosure in judicial proceedings. The thought is that witnesses should be encouraged to tell all

they know without fearing reprisal, because the tools of the judicial process—rules of evidence, cross-examination, the fact-finder, and the penalty of perjury—will be able to uncover the truth. *See Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984). The interest in complete disclosure is no less diminished at the pretrial stage, at a preliminary hearing, or at a suppression hearing. The tools of the judicial process are no less present to ferret out the truth at these times. In addition, the criminal defendant enjoys the immediate right at all stages of the judicial process to submit his or her own evidence and to cross-examine the witnesses.

Nor does the common law appear to distinguish between trial and pretrial testimony for the purpose of according absolute immunity for witnesses. In discussing the history of common law immunity, the Court in *Briscoe* noted that "[t]he immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law." 460 U.S. at 330-31. Other courts have similarly refused to distinguish between trial and pretrial proceedings in discussing common law immunity. *See Holt*, 832 F.2d at 125; *Charles v. Wade*, 665 F.2d 661, 666 (5th Cir. 1982), *cert. denied*, 460 U.S. 1036 (1983); *Conley v. Office of the Public Defender*, 653 F.2d 1241, 1242 (8th Cir. 1981).

B.

Several courts have extended *Briscoe's* holding to pretrial proceedings. The Courts of Appeals for the Second, Sixth, and Seventh Circuits have applied the rationale of *Briscoe* to conclude that witnesses who testify before a grand jury are absolutely immune from civil liability under section 1983. *See Macko v. Byron*, 760 F.2d 95, 97 (6th Cir.

1985); *San Filippo v. United States Trust Co.*, 737 F.2d 246, 254 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985); *Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir.), *cert. denied*, 464 U.S. 1018 (1983). In *Briggs v. Goodwin*, 712 F.2d 1444, 1448-49 (D.C. Cir. 1983), the court held that a United States Attorney enjoyed absolute immunity for testimony given during grand jury proceedings. "[T]he rationale of *Briscoe* applies with equal force whenever a witness testifies in a judicial proceeding the function of which is to ascertain factual information." *Id.* at 1449. Finally, in *Holt*, the Court of Appeals for the Ninth Circuit noted that "[i]n adversarial pretrial proceedings as well as at trial, absolute witness immunity is essential if the truth-seeking function of the proceeding is to be fully served." 832 F.2d at 127.

Other courts have cited *Briscoe* to extend civil damages immunity to guardians, therapists, and attorneys who provide reports and recommendations to the family court, *Myers v. Morris*, 810 F.2d 1437, 1466 (8th Cir.), *cert. denied*, 108 S. Ct. 97 (1987), and to probation officers who allegedly include false statements in pretrial bond reports and presentence reports, *Tripati v. INS*, 784 F.2d 345, 348 (10th Cir. 1986), *cert. denied*, 108 S. Ct. 755 (1988). In *Sprecher v. Graber*, 716 F.2d 968, 975 (2d Cir. 1983), the court applied the doctrine of witness immunity to bar a civil damages claim against a SEC official for submitting to the Commission during the course of a corporate investigation an affidavit that allegedly contained false and perjurious information.

C.

Yet we are aware that other courts have refused to extend witness immunity to the pretrial setting. *See*

Anthony v. Baker, 767 F.2d 657, 663 (10th Cir. 1985) (*Briscoe* does not afford absolute immunity for testimony before grand jury); *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, 261 (5th Cir.) (absolute immunity does not extend to testimony of state official at probable cause hearing), *modified on different grounds*, 744 F.2d 1131 (5th Cir. 1984).

But we do not find the rationales underlying these cases to be persuasive. They do not respond to the public policy considerations that we set forth in *Brawer* and that the Court acknowledged in *Briscoe*. Especially, they do not respond to the reality that "[a] witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence." *Briscoe*, 460 U.S. at 333. As the Court of Appeals for the District of Columbia stated in *Briggs*:

> *Briscoe* emphasized the concern that the absence of immunity would interfere with the ability of "judicial proceedings" "to determine where the truth lies." That concern applies not only to trials, but to any judicial proceeding where the testimony of witnesses might be affected by the lack of immunity. Thus, the rationale of *Briscoe* applies with equal force whenever a witness testifies in a judicial proceeding the function of which is to ascertain factual information.

Briggs, 712 F.2d at 1448-49 (footnotes omitted).

We therefore conclude that witness Stewart is entitled to absolute immunity from civil liability for his testimony at Williams' preliminary hearing and suppression hearings. The district court did not err in dismissing Williams'

claims against Stewart for allegedly giving perjured testimony at these hearings.

IV.

We next turn to the district court's decision to dismiss without prejudice two of Williams' allegations. The magistrate noted that two of Williams' civil rights claims would normally survive a Rule 12(b)(6) motion to dismiss: (1) that Hepting, Schueler, Scarfo, and Widdowson ceased investigating certain aspects of the case because Williams was black, and (2) that Schueler, Scarfo, and Widdowson subjected Williams to a suggestive pretrial encounter to enable Stewart to falsely identify Williams at the defendant's preliminary hearing. However, because these allegations challenged Williams' underlying criminal conviction while a state court appeal was pending, the magistrate determined that the contentions "should at least be stayed until presented to and disposed of by the state courts." App. at 75a.

Instead of staying Williams' claims, however, the magistrate recommended dismissing Williams' allegations without prejudice if the defendants agreed to waive a statute of limitations defense in case Williams elected to refile his claims in federal court within two years after pursuing his state court appeal. Because the defendants filed the requested waiver, the district court dismissed without prejudice Williams' failure-to-investigate and suggestive pretrial identification claims.

A.

"[A] damages action by a state prisoner [can] be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies."

Preiser v. Rodriquez, 411 U.S. 475, 494 (1973); *see also Wolff v. McDonnell*, 418 U.S. 539 (1974). Some courts, however, have developed a limited exhaustion requirement when a civil rights damages action challenges the fact of confinement by attacking the underlying criminal conviction that caused the confinement. *See Martin v. Merola*, 532 F.2d 191, 194-95 (2d Cir. 1976); *Fulford v. Klein*, 529 F.2d 377, 378 (5th Cir. 1976), *aff'd en banc*, 550 F.2d 342 (5th Cir. 1977); *Guerro v. Mulhearn*, 498 F.2d 1249, 1252-55 (1st Cir. 1974). "Where the federal court, in dealing with the question of damages caused by violation of civil rights, would have to make rulings by virtue of which the validity of a conviction in contemporary state proceedings would be called in question, the potential for federal-state friction is obvious. The federal ruling would embarrass, and could even intrude into, the state proceeding. Guerro, 498 F.2d at 1253; *see Younger v. Harris*, 401 U.S. 37 (1971).

In *Tower v. Glover*, 467 U.S. 914, 923 (1984), the Court recognized the line of cases requiring a district court to abstain from deciding a section 1983 action for damages stemming from an unlawful conviction pending the collateral exhaustion of state court attacks on the conviction itself, but noted that under the facts of that case it was not required to decide the issue. Similarly, in *Davis v. Rendell*, 659 F.2d 374, 378 (3d Cir. 1981), we were not required to decide "whether exhaustion should be required in a damage action where the basis of the claim will in some manner suggest the invalidity of the plaintiff's criminal conviction." Most recently, in *Harper v. Jeffries*, 808 F.2d 281 (3d Cir. 1986), we recognized that when factual and legal issues inherent in the section 1983 and habeas corpus actions overlap, a federal court's premature adjudication of the

section 1983 case would interfere with congressional policy requiring initial resort to state tribunals in habeas corpus petitions:

> To accommodate these concerns, it would be proper for the district court to stay Harper's section 1983 action until he has had an opportunity to exhaust all state remedies on his habeas corpus claim. If, after exhaustion, Harper still has not received any relief, his petition for habeas corpus and his section 1983 claim could then be heard together in federal district court.

Id. at 285.

In the present case, Williams' civil rights claims seek, in essence, to attack the validity of his state court conviction. Yet an appeal of Williams' conviction and death penalty sentence is currently pending before the Pennsylvania Supreme Court. *See* app. at 40a-43a. Under these circumstances, the potential for federal-state friction is obvious. The district court can avoid that friction by abstaining from deciding Williams' allegations until the Pennsylvania Supreme Court has had a complete opportunity to review the circumstances surrounding Williams' indictment and conviction. We therefore agree with the district court's decision to abstain from currently deciding Williams' allegations that attack the validity of his state court conviction, until they are presented to and disposed of by the state courts.

B.

Yet we disagree with the procedure employed by the district court in avoiding premature adjudication. Williams' civil rights claims seek damages, relief that is unavailable from his ongoing state proceedings. We have required the district court to stay rather than dismiss

claims that are under consideration in ongoing state proceeding. *See Monaghan v. Deakins,* 798 F.2d 632, 635 (3d Cir. 1986), *aff'd in relevant part,* ___ U.S. ___ (56 U.S.L.W. 4060, 4063, Jan. 12 1988); *Crane v. Fauver,* 762 F.2d 325, 328-29 (3d Cir. 1985). In *Monaghan,* we stated that "a district court, when abstaining from adjudicating a claim for injunctive relief, should stay and not dismiss accompanying claims for damages and attorney fees when such relief is not available from the ongoing state proceedings." 798 F.2d at 635.

In *Deakins v. Monaghan,* ___ U.S. ___ (56 U.S.L.W. 4060, Jan. 12, 1988), the Supreme Court reviewed our decision in *Monaghan.* Although vacating a portion of our judgment on mootness grounds, the Court proceeded to pass on the propriety of our "must stay" rule. It determined that when abstention is required, "the District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding." ___ U.S. at ___, U.S.L.W. at 4063. Noting that the rule promulgated by this court "is sound," the Court recognized that staying claims for monetary relief that are unavailable in ongoing state proceedings "allows a parallel state proceeding to go forward without interference from its federal sibling, while enforcing the duty of federal courts 'to assume jurisdiction where jurisdiction properly exists.' " *Id.* (citation omitted).

Accordingly, we hold that the district court should have stayed instead of dismissed without prejudice Williams' failure-to-investigate and suggestive pretrial identification claims. Because these particular federal court claims for damages seek relief that is unavailable in Williams' ongoing state proceedings, the allegations should be stayed

pending the outcome of his state court appeal on the underlying conviction.

V.

We have considered the remaining contentions raised by appellant and do not believe that the district court's treatment of them amounted to reversible error, *viz*, that appellant alleged facts sufficient to establish a conspiracy among the police officers, that the district court abused its discretion in denying a request to amend the complaint, and that it erred in applying the teachings of *Imbler v. Pachtman*, 424 U.S. 409 (1976), to the actions of prosecutor Hepting, and in determining that the conduct of police officers did not constitute the proximate cause of Williams' injury.

VI.

We will affirm the judgment of the district court in all respects, except that we will remand the cause to allow the court to amend its order that dismissed the allegations without prejudice described in Part IV.B. to provide that the consideration of these issues is stayed pending the outcome of appellant's state court proceeding.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States Court Of Appeals

FOR THE THIRD CIRCUIT

No. 87-3333

RONALD A. WILLIAMS, P-8467
Appellant

vs.

DAVID A. HEPTING, Assistant District Attorney; CHIEF SCARFO; LT. J. F. WIDDOWSON; CPL. SCHUELER; OFFICER LEWIS; OFFICER HARTMAN; ROBERT F. STEWART; GARY ARCHER; PAUL BOWSER, JR.

Appeal from the United States District Court for the Western District of Pennsylvania

(D.C. Civil No. 86-1715)

Submitted under Third Circuit Rule 12(6)
March 9, 1988

Before: WEIS*, GREENBERG and ALDISERT
Circuit Judges.

(Filed April 18, 1988)

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* The Honorable Joseph F. Weis, Jr. was an active judge at the time this appeal was decided. He has now assumed senior status.

ORDER AMENDING OPINION

Upon consideration of the motion for clarification of the opinion issued by this Court in the above matter and the answer in opposition thereto, it is ORDERED that the slip opinion of this Court filed April 18, 1988, be and the same is hereby amended as follows:

On page 5, second paragraph, line 14-16, delete:

"A hearing conducted later by the trial court, however, determined that no jury tampering had occurred."

BY THE COURT

/s/ RUGGERO J. ALDISERT
Circuit Judge

Dated: May 24, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B
In The United States District Court
For The Western District Of Pennsylvania

RONALD A. WILLIAMS,
Plaintiff,

v.

DAVID A. HEPTING,
CHIEF SCARFO
LT. J. F. WIDDOWSON,
CPL. SCHUELER,
OFFICER LEWIS,
OFFICER HARTMAN,
ROBERT F. STEWART,
GARY ARCHER,
PAUL BOWSER, JR.,
Defendants.

Civil Action
No. 86-1715

MEMORANDUM ORDER

Plaintiff's complaint was received by the Clerk of Court on August 8, 1986, and was referred to Chief United States Magistrate Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. Section 636(b)(1), and Rules 3 and 4 of the Local Rules of Magistrates.

The magistrate's report and recommendation, filed on March 27, 1987, recommended on the basis of Rule 12(b)(6) of the Federal Rules of Civil Procedure, that (1) all claims against witness Robert Stewart be dismissed; (2) all claims against jurors Gary Archer and Paul Bowser, Jr., be dismissed; (3) all claims against Assistant District Attorney David S. Hepting be dismissed—except for the Section

1983 claim that he deliberately failed to investigate an aspect of plaintiff's criminal case because of plaintiff's race; (4) all claims against Cranberry Township Police Officer Hartman be dismissed; (5) all claims against Cranberry Township Police Officer Lewis be dismissed; (6) all claims against Cranberry Township Police Officers Schueler, Scarfo, and Widdowson be dismissed—except for the Section 1983 claims that those officers ceased investigating an aspect of plaintiff's case because of plaintiff's race and subjected him to a suggetive encounter with a prosecution witness immediately prior to his preliminary hearing. The magistrate's report and recommendation further recommended that if defendants Schueler, Scarfo, Widdowson and Hepting, file a waiver of the statute of limitations defense within twenty days of service of the report and recommendation the above claims which are not dismissible on Rule 12(b)(6) grounds be dismissed, without prejudice, until such time as the plaintiff has presented his claims to the state courts and those courts have disposed of them. The parties were allowed ten (10) days from the date of service to file objections. Service was made on plaintiff by delivery to the State Correctional Institution at Huntingdon, where he is incarcerated and on defendants. On April 17, 1987, plaintiff filed objections and a request to be given ninety days to file an amended complaint or a motion to hold this case in abeyance until the state court evidentiary hearing has been conducted. Defendants Schueler, Scarfo, Widdowson and Hepting have each filed the waiver of statute of limitations defense. After *de novo* review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 6th day of May, 1987;

IT IS HEREBY ORDERED that defendants' motions to dismiss are granted.

IT IS FURTHER ORDERED that the following claims are dismissed without prejudice to plaintiff's right to refile them after he has presented them to the state courts and those courts have disposed of them: plaintiff's claim against Assistant District Attorney David S. Hepting that he deliberately failed to investigate an aspect of plaintiff's criminal case because of plaintiff's race and plaintiff's claims against defendants Schueler, Scarfo and Widdowson that they ceased investigating an aspect of plaintiff's case because of his race and subjected him to a suggestive encounter with a prosecution witness immediately prior to his preliminary hearing.

IT IS FURTHER ORDERED that plaintiff's request for ninety days to file an amended complaint or to hold this case in abeyance is denied.

The report and recommendation of Magistrate Sensenich, dated March 27, 1987, is adopted as the opinion of the court.

/s/ PAUL A. SIMMONS
PAUL A. SIMMONS
United States District Judge

cc: Ila Jeanne Sensenich
Chief U.S. Magistrate

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APPENDIX C
In The United States District Court
For The Western District Of Pennsylvania

RONALD A. WILLIAMS,
Plaintiff,

v.

DAVID A. HEPTING,
CHIEF SCARFO
LT. J. F. WIDDOWSON,
CPL. SCHUELER,
OFFICER LEWIS,
OFFICER HARTMAN,
ROBERT F. STEWART,
GARY ARCHER,
PAUL BOWSER, JR.,
Defendants.

Civil Action
No. 86-1715

MAGISTRATE'S REPORT AND RECOMMENDATION

I. Recommendation

It is recommended, on the basis of Rule 12(b)(6) of the Federal Rules of Civil Procedure, that (1) all claims against witness Robert Stewart be dismissed; (2) all claims against jurors Gary Archer and Paul Bowser, Jr., be dismissed; (3) all claims against Assistant District Attorney David S. Hepting be dismissed—except for the Section 1983 claim that he deliberately failed to investigate an aspect of plaintiff's criminal case because of plaintiff's race; (4) all claims against Cranberry Township Police Officer Hartman be dismissed; (5) all claims against Cranberry Township Police Officer Lewis be dismissed; (6) all claims against

Cranberry township Police Officers Schueler, Scarfo, and Widdowson be dismissed—except for the Section 1983 claims that those officers ceased investigating an aspect of plaintiff's case because of plaintiff's race and subjected him to a suggestive encounter with a prosecution witness immediately prior to his preliminary hearing.

It is further recommended that if defendants Schueler, Scarfo, Widdowson and Hepting, file the attached waiver of the statute of limitations defense within twenty days of service of this report and recommendation the above claims which are not dismissible on Rule 12(b)(6) grounds be dismissed, without prejudice, until such time as the plaintiff has presented his claims to the state courts and those courts have disposed of them.

II. Report

A. Background

Ronald A. Williams, a prisoner at the State Correctional Institution at Huntingdon, alleges in this action, brought under 42 U.S.C. Sections 1981, 1983, 1985, 1986 and 1988, that his constitutional rights were violated by a Butler County assistant district attorney, five Cranberry Township police officers, a prosecuting witness, and two members of a Butler County jury during the course of a state criminal investigation and prosecution that resulted in his first degree murder conviction and death sentence. An expansive reading of Williams' *pro se* complaint reveals the following material allegations: On August 5, 1985, a murder occurred in a Cranberry Township trucking lot. The following day, defendant Robert Stewart, who worked in the area, telephoned the township police department with information about the crime. Defendant

Lewis—a township police officer—was dispatched to interview Stewart. Stewart told Lewis that he had observed a white man running to a car with a second party. Williams, who is black, was not described by Stewart as one of the men. Later, defendant David Hepting—a Butler County assistant district attorney—conspired with defendants Scarfo, Widdowson, Schueler, Hartman and Lewis—all of whom were Cranberry Township police officers—to "create" the necessary evidence to sustain a murder case against Williams. In furtherance of the conspiracy—which was motivated by the fact that Williams was an ex-felon, black, and believed by them to be guilty—defendants Hepting, Scarfo, Widdowson and Schueler convinced defendant Stewart to change his initial statement to the police and to falsely identify Williams as the driver of a car that was chased from near the scene of the crime by Officer Hartman. Plaintiff alleges that Stewart later testified to that fact at Williams' preliminary hearing, suppression hearing and trial and committed other acts of perjury that led to Williams' conviction. Defendants Hepting, Lewis, Schueler, Widdowson and Scarfo were aware that Stewart was committing perjury but, nevertheless, permitted it to occur.

Plaintiff also alleges that in furtherance of the conspiracy, Officer Hartman also committed perjury at Williams' preliminary hearing in order to buttress Stewart's testimony.

Officer Lewis, who, as noted previously, had interviewed defendant Stewart shortly after Stewart's telephone call to the Cranberry Township Police Department, suppressed exculpatory evidence from the interview which would have shown that Stewart had falsely testified about

Williams' possible involvement in the murder. The evidence in question related to the interview during which Stewart had not been able to specifically identify anybody, linked to the crime car, had described one of the two passengers as being white (which contradicted Stewart's testimony that he had observed two black men in a car), and had given a very different description of the car in question. Defendants Hepting, Schueler, Widdowson and Scarfo, acting in concert, suppressed the exculpatory evidence in order to conceal Stewart's perjury and to obtain a conviction.

A handwritten note was found which alluded to the scene of the murder and the approximate time the murder was committed. Assistant District Attorney Hepting and Lt. Widdowson interviewed a third party to ascertain the author of the note and took a handwriting exemplar from the party. Defendants Hepting, Schueler, Widdowson and Scarfo, who had possession of the note as well as samples of Williams' handwriting, knew that the handwriting differed and that Williams could not have prepared the note. Nevertheless, they ceased to investigate that line of inquiry in order to deprive plaintiff of exculpatory evidence. In addition, prosecuting attorney Hepting concealed evidence about the matter at trial and subsequently stated that the handwriting exemplars and police reports concerning the handwriting investigation did not exist. After Williams' trial, Hepting produced the exemplars and reports by order of court.

Defendants Scarfo, Widdowson and Schueler attempted to "bully and intimidate" witnesses and refused to take statements that contradicted their theory of Williams' guilt.

Faced with a weak case and the unbelievable testimony of Stewart, the state's only witness against Williams, prosecutor Hepting and the police officer defendants clandestinely informed juror, Paul Bowser, Jr., and alternate juror, Gary Archer of Williams' past criminal record in order to prejudice the jury's determination and obtain a conviction. Defendant Archer, in conspiracy with one or more of the defendants, informed the other jury members of Williams' past criminal record prior to the verdict. Defendant Bowser, in conspiracy with defendant Hepting, entered into deliberations with knowledge of Williams' criminal record and, in concert with Hepting and the police defendants, persuaded the jury to find Williams guilty.[1] A hearing was later convened to consider Williams' allegations of jury tampering. No tampering was found by the court. Williams, however, claims he did not have a fair opportunity to air the tampering claim because, among other things, his attorney was not present to represent him. (The court denied a request for postponement due to the illness of his attorney.) Moreover, prosecutor Hepting—shortly before the start of the jury tampering hearing—had ex-parte communications with the jurors in order to conceal the wrongdoing in influencing their testimony.

Williams' complaint alleges a web of constitutional offenses linked to the failure to properly investigate his case, falsification and concealment of evidence, the subornation and commission of perjury, and the clandestine

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[1]Plaintiff alleges that a member of the jury later acknowledged in an affidavit that her decision was influenced by unspecified information given to her by Bowser.

tampering with members of his jury. As relief, it seeks compensatory and punitive damages.[2]

The respective defendants have responded to the complaint by filing Rule 12(b)(6) motions to dismiss.

B. Discussion

1. The Commission of Perjury

Williams' claim that witness Robert Stewart presented perjured testimony against him at a series of judicial proceedings is barred by the doctrine of absolute witness immunity which shields private witnesses from damage liability arising from the presentation of knowingly false testimony. See *Brisco v. LaHue*, 460 U.S. 325 (1985). This is also true with respect to the claim that Officer Hartman committed perjury at Williams' preliminary hearing.

2. The Subornation, Use and Condonation of Perjury

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). It is well established that a prosecutor's knowing use of perjured testimony violates that right. See *Giglio v. United States*, 405 U.S. 150, 153 (1972). In fact, due process requires not only that the prosecutor avoid soliciting false testimony but also that he not sit idly by and allow it to go uncorrected when it is given. *Burke v. Elliott*, 606 F.2d 371, 375 (2d Cir. 1979).

Broadly construed, Williams' complaint alleges that the Assistant District Attorney Hepting not only acquiesced in the commission of perjury by Robert Stewart but

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[2]Williams' complaint also requests "any relief the court deems fitting to grant." As explained in his Response to Defendants' Brief in Support of its Motion to Dismiss, however, this request relates solely to the award of damages. It does not seek to obtain his release from prison.

actually encouraged Stewart to testify falsely. While those allegations depict reprehensible prosecutorial misconduct—even if true, they do not state a cognizable federal damage claim against Hepting.

It is well settled that state prosecutors enjoy absolute immunity from claims for damages stemming from prosecutorial activities "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). The immunity shield extends to all activities involved in the initiation and presentation of a criminal prosecution, including the knowing use of perjured testimony. *Id.* at 431 and n.34; *Henzel v. Gerstein*, 608 F.2d 654, 657 (5th Cir. 1979). Clearly, the alleged condonation of or even the subornation of perjured testimony by Assistant District Attorney Hepting falls squarely within the band of prosecutorial immunity since it occurred in the judicial phase of the prosecution during the presentation of the state's case. See *Fullman v. Graddick*, 739 F.2d 553, 559 (11th Cir. 1984); *Lee v. Willins*, 617 F.2d 32, 322 (2d Cir. 1980).

Williams makes similar allegations against Officer Schueler and probably Chief Scarfo and Lt. Widdowson in connection with the allegedly perjurous testimony of defendant Stewart. He alleges in his complaint that in "furtherance of the conspiracy, Defendant Hepting, Schueler and *others* summoned Defendant Stewart to the District Attorney's Office prior to the preliminary hearing and conspired with him to identify Plaintiff as the driver of the car he viewed, in order to create a prima facie case against Plaintiff and try him for murder."[3] He intimates that the

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[3]Paragraph 16 of the complaint.

others who were involved included Scarfo and Widdowson.[4]

The officers, of course, cannot rely on the defense of prosecutorial immunity. However, even if one assumes that subornation of perjury states a constitutional violation, no claim of that nature has been adequately alleged here. A plaintiff pleading a violation of his civil rights must do so in a factually specific way. See *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976). Even a *pro se* civil rights claim may not be couched in vague and conclusory terms, but must be fact based if it is to avoid a dismissal. See *Brown v. Sielaff*, 474 F.2d 826, 827 (3d Cir. 1973); *Esser v. Weller*, 467 F.2d 949, 950 (3d Cir. 1972). Williams, while suggesting that the officers somehow got Stewart to agree to commit perjury, nowhere describes *how* the officers persuaded Stewart to do so. He does not, for example, allege that they threatened or intimidated Stewart, nor does he allege that Stewart was bribed. Instead, he merely advances the bald conclusion that Stewart "conspired" with the officers to commit perjury. This simply is not enough to frame a cause of action under a subornation of perjury theory. There must be at least a modicum of facts from which to draw an inference that the officers actually did persuade, coerce or otherwise convince Stewart to lie about what he had witnessed. Merely asserting that the officers met with Stewart (a fact that is hardly unusual during the course of a criminal investigation) and

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[4]See paragraph 18 of the complaint. In somewhat contradictory fashion, however, plaintiff later speaks of Schueler, Hepting and "other unknown officers" meeting with Stewart to get him to commit perjury. See page 4, paragraph (d) of plaintiff's Response to defendant's Brief in Support of their Motion to Dismiss.

conspired with him to hatch lies is not even remotely sufficient in that regard. Under the circumstances, the subornation of perjury claim should be dismissed at the threshold.

In addition to asserting that the defendant officers suborned perjury, the complaint alleges that the officers were aware that perjury was being committed but made no effort to expose it.[5] This is an apparent attempt to frame a cause of action under 42 U.S.C. Section 1986—a civil rights statute that makes it unlawful for any person having knowledge of any wrongdoings conspired to be done under 42 U.S.C. Section 1983 and the power to prevent the wrongdoing to fail to exercise due diligence to prevent the wrongdoing. Section 1986 is a derivative statute which requires a showing that Section 1985 has been violated. A failure to state a claim under Section 1985, *a fortiori*, precludes the maintenance of an action under Section 1986. See *Brawer v. Horowitz*, 535 F.2d 830, 841 (3d Cir. 1976); *Hamilton v. Chaffin*, 506 F.2d 904, 914 (5th Cir. 1975). Williams' complaint does not establish a violation of Section 1985.

Section 1985(2), the provision that apparently underlies this claim, makes it unlawful for two or more persons to conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws. To establish a claim, there must be a showing of a class-based conspiracy. See e.g. *Griffin v. Breckinridge*, 403 U.S. 88, 103 (1971). Williams does allege class-based behavior. He asserts that all of the putatively illegal conduct in this case—including the condonation of perjury—was motivated, at least in

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[5]Paragraph 42 of the complaint can be liberally construed to make this allegation.

part, by the fact that he is black. He does not sufficiently allege, however, the existence of a conspiracy. Under Section 1985, conspiracies must be pleaded with more than a bare allegation that the defendants "conspired" to deprive him of his rights. *Henzel v. Gerstein*, 608 F.2d 654, 659 (5th Cir. 1979). There must be specific factual allegations showing the existence of a conspiracy. *Ibid.* As indicated previously, no such allegations appear here. The absence of such facts defeats the Section 1985(2) claim, see *Martinez v. Winner*, 548 F. Supp. 278, 324 (D. Col. 1982), and thereby renders the Section 1986 claim dismissible. See e.g. *Brawer v. Horowitz, supra*, 535 F.2d at 841.[6]

To the extent that Williams' complaint can be read to assert a claim against the officers for the actual introduction of perjurous testimony against him during the criminal proceedings, any such assertion lacks merit. The introduction of Stewart's and Officer Hartman's allegedly perjurous testimony came during proceedings over which the assistant district attorney had apparent control as the state prosecutor. Section 1983, the obvious statutory basis for this claim, makes it unlawful for a person to *subject* another to the violation of a constitutional or other federally guaranteed right. Section 1983 claims are a species of tort liability. *Owen v. City of Independence*, 445 U.S 622, 635 (1980). A plaintiff proceeding under the section must show that the defendant, by his conduct or failure to act, created a condition that was the *proximate* cause of the

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[6]In addition to the above reason for declining to hold the officers responsible for the failure to expose perjurous testimony there is another reason. It would be anomalous to immunize—on the one hand—a police officer who actually takes the stand as a witness and commits perjury, see *Briscoe v. LaHue, supra*, while exposing to liability an officer who acquiesces in or condones another's presentation of perjured testimony.

injury. See *Daniels v. Gilbreath*, 668 F.2d 477, 480 (10th Cir. 1982); *Arnold v. International Business Machines*, 637 F.2d 1350, 1355-1356 (9th Cir. 1981); *Rheuark v. Shaw*, 628 F.2d 297, 305-306 (5th Cir. 1980). It was David Hepting—the prosecuting attorney—and not Chief of Police Scarfo or the other investigating officers who presumably had control over the prosecution and the presentation of testimony at Williams' hearing and trial. Therefore the act that immediately led to the introduction of perjurous testimony must be viewed as Hepting's act—not the officers'. The absence of a factual showing, within the complaint, that the officers controlled Hepting and that Hepting was merely a conduit for carrying out the officers' will, negates an inference that the officers were the *legal* or *proximate* cause of Williams' injury stemming from the introduction of the testimony.[7] See e.g. *Arnold v. International Business Machines*, 637 F.2d at 1356-1358. Under these circumstances, the introduction of perjury claim is also subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

3. The Suppression or Withholding of Exculpatory Evidence

The due process requirement that criminal prosecutions comport with prevailing notions of fundamental fairness imposes a duty on the prosecution to turn over any exculpatory evidence that would raise a reasonable doubt as to the defendant's guilt. *United States v. Agurs*, 427 U.S. 97, 112 (1976); *California v. Trombetta*, 467 U.S. 479, 485

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[7]As indicated previously, Williams' complaint is grounded not only on Section 1983. It also cites Sections 1981, 1985, 1986 and 1988 as bases for relief. Assuming that the pleading otherwise raises claims under the latter sections, those claims would also be defeated by the absence of proximate cause.

(1984). See also *Brady v. Maryland*, 373 U.S. 83 (1963). Williams alleges that Assistant District Attorney Hepting, at trial, deliberately concealed evidence about a handwritten note relating to the murder as well as exemplars of Williams' and a third party's handwriting that, apparently, would have raised doubt about Williams' involvement in the crime. While the deliberate withholding of exculpatory information may warrant criminal prosecution or disbarment, it is an activity that is intimately associated with the judicial phase of the criminal process and, therefore, fully shielded by the doctrine of absolute prosecutorial immunity. See *Imbler v. Pachtman*, 424 U.S. at 430-31 and n. 34; *Fullman v. Graddick*, 739 F.2d at 559; *Briscoe v. LaHue*, 663 F.2d 713, 721-722 (7th Cir. 1981); *Henzel v. Gerstein*, 608 F.2d at 657.

The contention that Hepting withheld exculpatory evidence which had been derived from an interview with Officer Lewis also falls within the band of immunity provided for prosecutorial misconduct and fails for the same reason discussed above.

Williams attempts to assert a Section 1983 claim against Officers Schueler, Scarfo, Widdowson and Lewis for the suppression of the exculpatory evidence. However, his acknowledgment that prosecutor Hepting was also involved in the suppression defeats any such claim against those officers. As discussed in the previous section, 1983 claims are a species of tort liability and a plaintiff proceeding under the Section must show that the defendant, by his conduct or failure to act, created a condition that was the *proximate* cause of the injury. David Hepting, as the district attorney, was in charge of Williams' prosecution. It was solely *his* function, and not the investigating officers' function, to determine what evidence would be introduced

at trial and *his* responsibility to make it available to Williams. Therefore, the act or omission that immediately led to the withholding of the evidence in question and the proximate cause of any injuries stemming therefrom was attorney Hepting's—not the officers'. While Williams suggests that the decision to suppress the evidence was the product of a conspiracy between the officers and Mr. Hepting, the absence of a factual showing that the officers controlled Hepting and that Hepting was a mere conduit for carrying out the officers' agenda would negate an inference that the officers were the *legal* or *proximate* cause of Williams' injury. See *Arnold v. International Business Machines*, 637 at 1356-1358.

4. The Failure to Investigate

Williams' complaint alleges that prosecutor Hepting, Chief Scarfo and Officers Schueler and Widdowson ceased investigating the line of inquiry concerning the note in order to deprive Williams of exculpatory evidence. It charges that this as well as other acts and omissions by those parties was motivated, in part, by the fact that Williams is black.

With reference to the claim against prosecutor Hepting, it is doubtful that Hepting can assert absolute prosecutorial immunity as a defense since the scope of such immunity does not extend to the investigative phase of a criminal prosecution where a "purely" investigative function is involved. See *Forsyth v. Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979). It appears from the complaint that Hepting's decision to terminate further inquiry into the author of the note *was* a purely investigative decision. However, because a state prosecutor is under no duty under the Due Process Clause to properly investigate a

crime, see *Simmons v. Wainwright*, 585 F.2d 95, 96 (5th Cir. 1978), Hepting's decision—even if corruptly motivated—cannot form a basis for a civil rights action based upon a due process theory.

Williams' allegations, as reflected above, however, are not limited to the Due Process Clause. They are also grounded on an equal protection theory: namely, that Hepting deliberately terminated a potentially exculpatory line of investigation because of Williams' race. Equal protection requires that the state not purposely discriminate against those who are entitled to be treated in the same manner as other similarly situated persons. See *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). The Fourteenth Amendment's concern for the elimination of discriminatory treatment based upon racial criteria precludes the state from mistreating a person because of his race. See *Hall v. Pennsylvania State Police*, 570 F.2d 86, 90 (3d Cir. 1978). Even if Williams had no right under the Due Process Clause to expect defendant Hepting to reasonably investigate his case, if Hepting had the authority to do so under state law but chose not to because of Williams' race, this would state a colorable claim under the Equal Protection Clause. See e.g. *Wright v. Cuyler*, 517 F. Supp. 637, 643 (E.D. Pa. 1981). Although it is unclear from the pleading whether a county prosecutor in Pennsylvania has the authority under state law either to supervise or participate in a criminal investigation, under the liberal rules governing the construction of *pro se* complaints in Rule 12(b)(6) motions to dismiss, the court will assume, for now, that Hepting had such authority but purposely elected to abandon the inquiry because of Williams' race. This states a cognizable claim from which prosecutor Hepting enjoys no absolute immunity. But see *Hall v. Flathead County Attorney*, 478

F. Supp. 644, 645 (D. Mont. 1979); *Halpern v. City of New Haven*, 489 F. Supp. 841, 843-844 (D. Conn. 1980).

The complaint also alleges that Officers Scarfo, Schueler, and Widdowson intentionally abandoned the investigation of exculpatory evidence relating to the note because of plaintiff's race. For the reasons discussed above, that allegation, at a minimum, states a claim against them under the Equal Protection Clause.

5. Pretrial Identification Claim

The complaint suggests that defendants Hepting, Scarfo, Widdowson and Schueler not only conspired with witness Robert Stewart to have Stewart falsely identify Williams, but also induced Stewart to falsely identify Williams through a suggestive encounter between Williams and Stewart arranged by the defendants shortly before Williams' preliminary hearing. According to the complaint, after Stewart had repeatedly been unable to describe Williams, the defendants placed Williams in a room with Stewart immediately prior to his preliminary hearing while Williams was in shackles, handcuffs and a prison uniform.

Although, as discussed previously, the conclusory allegation that the defendants somehow conspired with Stewart to obtain false testimony is deficient to raise a cognizable claim under the Civil Rights Act, the assertion that they induced a false identification by placing Williams in Stewart's presence under suggestive circumstances does raise a colorable constitutional claim. Pretrial confrontation between an accused and a testifying witness may offend due process if it is unduly suggestive. See *Boyd v. Henderson*, 555 F.2d 56 (2d Cir. 1977); *United States v.*

Bazan, 637 F.2d 363 (5th Cir. 1981). The taint of suggestiveness, however, must create "a very substantial likelihood of misidentification." See e.g. *United States v. Sebetich*, 776 F.2d 412, 417 (3d Cir. 1985), quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972). Because the corrupting influence inherent in Williams' encounter with the state's witness may have triggered a misidentification, a minimally adequate claim has been stated for purposes of surviving a motion to dismiss.

This claim, however, is only maintainable against the defendant police officers. It cannot lie against Assistant District Attorney Hepting for his role in the putative violation since, as noted previously, state prosecutors are absolutely immune from claims for damages stemming from activities "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. at 430. The alleged confrontation between Williams and Stewart occurred in connection with a preliminary hearing, shortly before the hearing actually convened. It was clearly part of the prosecutorial phase of Williams' criminal case and thus fell squarely within the scope of absolute immunity.

6. Communication of Williams' Criminal Record to Members of the Jury

The complaint alleges that in order to obtain a conviction, two jurors were informed by prosecutor Hepting and some of the police officer defendants of Williams' past criminal record. That information, according to Williams, seriously tainted the fact-finding process leading to his conviction.

The constitutional standard of fairness mandates that criminal defendants have "a panel of impartial, indifferent

jurors." *Murphy v. Florida*, 421 U.S. 794, 799 (1975). The exposure of jurors to information about a defendant's prior convictions may deprive the accused of due process. See *Id.* at 800-803. Whether it does, depends upon the circumstances of each case. See *Id.* at 800-803.

Coming in the surreptitious manner that it did in this case, one cannot, at this juncture, rule out the possibility that the alleged exposure by defendants to plaintiff's past criminal history *did* infect the decisionmaking process and thereby undermined plaintiff's right to a fair trial. There was no opportunity, for example—given the clandestine nature of the disclosures—for the court to caution the jury against considering the information or to instruct the jury about that matter. See e.g. *United States v. Ricardo*, 619 F.2d 1124, 1131-1132 (95th Cir. 1980). Under the circumstances, a colorable constitutional violation has been alleged.[8]

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[8]It is possible that Williams ultimately may be barred from asserting this claim because of the doctrine of collateral estoppel. His pleading shows that the state trial judge considered Williams' claim that jurors had information about his prior criminal record during a post-trial hearing. Collateral estoppel precludes relitigation of issues determined in a prior criminal proceeding in which the party against whom the earlier decision is asserted had a "full and fair opportunity" to litigate the issue." *Fontneau v. United States*, 654 F.2d 8, 10 (1st Cir. 1981). A district court, when faced with a question of collateral estoppel, cannot make a decision in a vacuum. It must have before it portions of the record of the prior criminal proceedings, including transcripts of the criminal court's findings. See *Basista v. Weir*, 340 F.2d 74, 81 (3d Cir. 1965); *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3d Cir. 1970); *Lomax v. Smith*, 501 F. Supp. 119, 121 (E.D. Pa. 1980). Therefore, should defendants even raise the issue of collateral estoppel, it must be considered within the framework of a motion for summary judgment, particularly in light of the fact that Williams' complaint attacks the fundamental fairness of the post-trial hearing.

A conclusion that Williams' constitutional rights were violated here does not dictate, however, that a claim has been stated against all of the parties. The pleading, for example, reflects that the disclosures came within the framework of the judicial phase of Williams' prosecution. Therefore, Assistant District Attorney Hepting cannot be liable for any wrongdoing associated with them. See *Imbler v. Pachtman*, 424 U.S. at 430. In addition, the claim cannot proceed against jurors Archer and Bowser under any of the civil rights statutes cited by the plaintiff as a basis for relief.

Among the statutes Williams is proceeding under is 42 U.S.C. Section 1981. That section reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

While the Section "on its face relates primarily to racial discrimination in the making and enforcement of contracts." *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975), it bars racial discrimination against blacks as to other affairs and transactions within its scope. See *Martinez v. Winner*, 548 F. Supp. at 322. The complaint does not allege that plaintiff was discriminated against in the making of contracts. Nor does it allege that Williams was denied the right to sue, be a party, or to give evidence—or show that he was discriminated against in the imposition of punishment, pains, penalties, taxes, licenses or exactions of some kind. In sum, the alleged wrongdoing

by the jurors does not fall within the intended scope of a Section 1981 action.[9]

Williams also grounds the jury tampering claim against the two jurors on 42 U.S.C. Section 1983. To frame a cause of action under Section 1983, the complaint must allege facts showing that the defendant deprived the plaintiff of a federal right while acting under color of state law. See *Emory v. Peller*, 756 F.2d 1547, 1554 (11th Cir. 1985); *Stanton v. Wainwright*, 665 F.2d 686, 687 (5th Cir. 1982). If the complaint does not disclose that defendant acted under color of state law, it fails as a matter of jurisdiction and cannot proceed. See *Polk County v. Dodson*, 454 U.S. 312, 315 (1981). The notion of acting under color of state law is not confined to the activities of public officers and officials. A party acts "under color of" state law when engaged in a conspiracy with state officials to deprive another of federal rights, *Tower v. Glover*, 467 U.S. 914 (1984), even if the state officials are themselves immune from civic liability. *Dennis v. Sparks*, 449 U.S. 24, 28 (1980).

In the present case, defendants Archer and Bowser, as mere jurors, are nominally private actors. However, Williams attempts to implicate them under Section 1983 by alleging that they conspired with state actors—namely, the immune assistant district attorney and several police officers. The existence of a conspiracy, however, has not been properly pleaded in this case. It is well settled that a claim of conspiracy under Section 1983 cannot be established on the basis of a conclusory allegation that a conspiracy existed. See *Diulus v. Churchill Valley Country*

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[9]For similar reasons, those claims that do survive against the state defendants—as discussed in previous sections of this report—cannot proceed under 42 U.S.C. Section 1981.

Club, 601 F. Supp. 677, 679 (W.D. Pa. 1985); *Hauptmann v. Wilentz*, 570 F. Supp. 351, 375 (E.D. Pa. 1983), aff'd 770 F.2d 1070 (3d Cir. 1985); *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1208 (7th Cir. 1980); *Powell v. Jarvis*, 460 F.2d 551, 553 (2d Cir. 1972). The pleadings must "specifically present facts tending to show an agreement and concerted action." *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983); *Diulus v. Churchill Valley Country Club*, 601 F. Supp. at 679. See also *DiRuggiero v. Rodgers*, 743 F.2d 1009, 1014, 1021 (3d Cir. 1984). Mere conjecture that there has been a conspiracy is not enough to establish a claim, *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d at 1208, and a claim may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of a conspiracy. *Fullman v. Graddick*, 739 F.2d at 557; *Slotnick v. Garfinkle*, 632 F.2d 163, 165-66 (1st Cir. 1980).

There are no facts alleged in the underlying complaint tending to show a conspiratorial agreement between the juror defendants and any public actors involved in this case or tending to show that the juror defendants undertook their activities (i.e. acquired or disseminated information about Williams' criminal convictions to other jurors and attempted to persuade the other jurors to convict Williams) pursuant to a mutual understanding with such actors. There is no more than a bald assertion that a conspiracy existed. Certainly, defendant Archer's informing the other jury members of plaintiff's past criminal record or defendant Bowser's vigorous efforts to convince the other members of plaintiff's guilt are not acts which, in themselves, indicate the existence of a conspiracy. Without a conspiratorial link there can be no Section 1983 liability on the jurors' part. Mere unilateral misconduct on their

part cannot be viewed as activities taken under color of state law.

Williams also grounds his jury tampering claim against Archer and Bowser on 42 U.S.C. Sections 1985 and 1986. As noted previously, Section 1985(2) makes it unlawful for two or more persons to "conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws." Unlike Section 1983, Section 1985(2) reaches purely private actions, see *Brawer v. Horowitz*, 535 F.2d at 839, provided there is a class-based conspiracy underlying the transaction. See e.g. *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971); *Simmons v. Zibilich*, 542 F.2d 259, 261 (5th Cir. 1976). Although Williams does allege a class-based animus on the part of the so-called conspirators, his conspiracy theory is unsupported by facts tending to show that a conspiracy actually existed. The absence of such facts defeats the Section 1985 claim, see *Martinez v. Winner*, 548 F. Supp. at 324, as well as the derivative Section 1986 claim against the jurors stemming from the alleged misconduct.

Finally, Williams attempts to construct a claim against defendants Archer and Bowser on the basis of 42 U.S.C. Section 1988. Section 1988, however, which speaks primarily to the recovery of attorney's fees in civil rights proceedings, is merely a procedural statute that creates no cause of action in itself. See *Taylor v. Nichols*, 558 F.2d 561, 568 (10th Cir. 1977). See also *Moor v. County of Alameda*, 411 U.S. 693 (1973). Therefore a Section 1988 claim against the jurors is subject to dismissal.

Because of the reasons expressed above, a cause of action will not lie against *defendant police officers* under

Sections 1981, 1985, 1986 or 1988 despite the existence of a colorable constitutional violation associated with the jury tampering issue.[10] Nor will a Section 1983 claim lie against them. To frame a cause of action under the Section, there must be an allegation showing that the defendant was personally involved in or caused the violation about which the plaintiff complains. See *Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976); *Palumbo v. Orr*, 579 F. Supp. 129, 134 (W.D. Pa. 1984). In the absence of such a showing, the defendant cannot be said to have perpetrated or committed the alleged harm and the complaint against him is subject to dismissal. See *Henderson v. Fisher*, 631 F.2d 1115, 1119 (3d Cir. 1980); *Ross v. Meagan*, 638 F.2d 646, 650 (3d Cir. 1981). See also e.g. *Anela v. City of Wildwood*, 790 F.2d 1063, 1068 (3d Cir. 1986).

In the present case, plaintiff has alleged no more than the fact that prosecuting attorney Hepting and "*other police defendants* in furtherance of the conspiracy to convict Plaintiff did approach and clandestinely inform members of the jury of Plaintiff's past criminal record"[11] and that "an alternate juror was told by *a police officer* of

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[10]With respect to the Section 1985 claim, there is another weakness in addition to the absence of a well-plead conspiracy. Section 1985(2) bespeaks a Congressional intent to insulate jurors from conspiracies to influence them in the performance of their duties. The conspiracy to influence jurors, however, must be carried out by force, intimidation or threat." *Brawer v. Horowitz*, 535 F.2d at 840. Williams' complaint, even when construed liberally cannot be read to allege any force, intimidation or threat on the part of the police officers. Instead, it asserts that the attempt to influence the jurors came in the form of apprizing them of Williams' record. Therefore, even if a conspiracy had been sufficiently alleged, because the means of carrying out the conspiracy did not fall within the purview of Section 1985, a claim under Section 1985 has not been stated.

[11]Paragraph 32 of the complaint.

plaintiff's past criminal record."[12] The particular officer or officers who informed the jurors are never identified. The failure to identify which of the five officers involved in this case gave the jurors the illicit information is a critical omission that saps the claim of any viability it might otherwise have had. See *Howell v. Cataldi*, 464 F.2d 272, 283 (3d Cir. 1972).

7. Threatening Witnesses and Refusal to Take Statements

Plaintiff alleges that Officers Scarfo and Widdowson, in furtherance of a conspiracy, threatened witnesses with criminal charges and refused to take statements from others who contradicted their information or theory of the case against him. He does not, however, identify the witnesses who were threatened, the nature of the threats, or the persons whose statements were not taken. The failure to plead such facts offends the specific pleading requirements governing civil rights matters and warrants the granting of defendants' motion to dismiss.

8. Omnibus Section 1986 Claim

Paragraph 42 of the complaint alleges the following:

> That Defendants Hepting, Stewart, Schueler, Hartman, Lewis, Widdowson, Archer, Scarfo and Bowser were all aware of some of the actions taken by all or some of their co-defendants to deny Plaintiff his rights to a fair trial, due process, create evidence, commit perjury, tamper with the jury or suppress exculpatory evidence and none made any effort to expose these wrongdoings or expose the conspiracy against Plaintiff.

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[12]Page 5, section (f) of plaintiff's response to defendants' brief in support of their motion to dismiss.

These allegations are obviously intended to frame a Section 1986 claim against the various defendants for failing to take steps to expose or prevent the deprivations allegedly caused by the underlying chain of conspiracies. For two reasons, they do not succeed. First, the failure to properly allege Section 1985 claims with respect to any items of the asserted misconduct would necessarily defeat a Section 1986 claim. See *Brawer v. Horowitz, supra*, 535 F.2d at 841. Second, the failure to specifically indicate *which* of the actions each of the defendants was aware of offends the specific pleading requirements governing civil rights actions.

CONCLUSION

Most of Williams' claims are subject to Rule 12(b)(6) dismissal. The few that appear to state a claim attack the fundamental fairness of the prosecutorial process and, by implication, the validity of Williams' criminal conviction. While actions which attack a state conviction and seek release from custody must first be presented to the state courts, actions seeking only money damages are not subject to the exhaustion of state remedies requirement. See *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973).

Plaintiff's claims against defendants Hepting, Schueler, Scarfo and Widdowson which are not subject to dismissal—that they ceased investigating an aspect of plaintiff's case because of his race and subjected him to a suggestive encounter with a prosecution witness immediately prior to his preliminary hearing—challenge his underlying criminal conviction. While exhaustion of state court remedies is not required in Section 1983 actions, *Wolff v. McDonnell*, 418 U.S. 539 (1974), some courts have developed a limited exhaustion requirement where the

Section 1983 damage action challenges the fact of confinement by attacking the underlying criminal conviction which caused the confinement. See *Fulford v. Klein*, 529 F.2d 377, 381 (5th Cir. 1976); *Courtney v. Reeves*, 635 F.2d 326, 330 (5th Cir. 1981); and *Landrigan v. City of Warwick*, 628 F.2d 736, 743 (1st Cir. 1980). In *Landrigan* the court stated:

> The effect of plaintiff's Section 1983 action, were he to prevail on his claim that the defendants lacked probable cause to arrest him for driving too fast for conditions, would be, in practical terms, much the same as the rendering of a delaratory judgment that the pending charge is baseless. The validity of the state charge would be substantially undermined even though the state, not being a party to the Section 1983 action, may not be barred from prosecuting . . . [T]he federalism concerns behind *Younger* abstention would seem applicable here; we therefore hold that plaintiff's section 1983 action, insofar as it concerns the alleged illegal arrest, should be stayed pending final determination in the state court system of the charge resulting from that arrest.

In *Tower v. Glover*, 467 U.S. 914, 923 (1984), the Court recognized the line of cases requiring a district court to abstain from deciding a Section 1983 action for damages stemming from an unlawful conviction pending the collateral exhaustion of state court attacks on the conviction itself, but noted that under the facts of that case it was not required to decide the issue. Similarly, in *Davis v. Rendell*, 659 F.2d 374, 378 (3d Cir. 1981), the court noted that it was not required to decide "whether exhaustion should be required in a damage action where the basis of the claim will in some manner suggest the invalidity of the plaintiff's criminal conviction." Most recently, in *Harper v. Jeffries*,

808 F.2d 281, 285 (3d Cir. 1986), the court recognized that where there is an overlap in the factual and legal issues inherent in the Section 1983 and habeas corpus actions, premature adjudication of the Section 1983 case by a federal court would interfere with congressional policy requiring initial resort to state tribunals in habeas corpus petitions. The court stated:

> To accommodate these concerns, it would be proper for the district court to stay Harper's Section 1983 action until he has had an opportunity to exhaust all state remedies on his habeas corpus claim. If, after exhaustion, Harper still has not received any relief, his petition for habeas corpus and his Section 1983 claim could then be heard together in federal district court.

Defendants' brief asserts that plaintiff now has an appeal pending before the Supreme Court of Pennsylvania which raises the same claims presented in this case.[13] While statements in a brief are not properly considered on a motion to dismiss, *Tunnell v. Wiley*, 514 F.2d 971, 975, n. 5 (3d Cir. 1975), plaintiff has failed to show that he has presented his claims to the state courts and since his complaint indicates that he is subject to the death penalty in addition to a sentence of five to ten years, it is apparent that every possible legal challenge to his conviction will be presented to the state courts.

Therefore, in accordance with *Harper v. Jeffries, supra*, the magistrate believes that while some of plaintiff's claims against defendants Hepting, Schueler, Scarfo and Widdowson are not subject to dismissal for failure to state a claim, they should at least be stayed until presented to and disposed of by the state courts.

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[13]Defendants' brief, page 20.

However, the magistrate believes an alternative disposition is appropriate. It has been observed that with the passage of time, prisoners frequently lost interest in their civil rights actions. They are transferred from one prison to another, their circumstances change, and sometimes they are released on parole. These changes in their circumstances result in changes in their focus and interests. After transfer to another prison they frequently lose interest in a case filed against prison officials in a previous prison and choose to concentrate their efforts on challenges to their present conditions of confinement. The courts have scheduled trials, jury and non jury, in cases in which prisoners have been released from prison, only to have the prisoners fail to appear, or appear and advise the court they now wish to dismiss the action. Therefore the magistrate believes that it would be appropriate to dismiss the action against defendants Hepting, Schueler, Scarfo and Widdowson, without prejudice, if each of these defendants files with this court and provides plaintiff with an executed waiver of the defense of the statute of limitations if plaintiff elects to refile his claims with this court within two years after he has presented the claims to the state courts in his challenges to his conviction. Since plaintiff is proceeding *in forma pauperis* and would have the right to request leave to proceed *in forma pauperis* at a later time he would not suffer a financial loss.

Therefore, it is recommended that the motions to dismiss filed by defendants Hepting, Schueler, Scarfo and Widdowson be denied as to plaintiff's claims that these defendants ceased investigating an aspect of his case because of his race and that defendants Schueler, Scarfo and Widdowson subjected him to a suggestive encounter

with a prosecution witness immediately prior to his preliminary hearing unless defendants file with this court within twenty days of service of this report, two executed copies of the attached waiver. One copy of each waiver shall be retained by the court and the other copy shall be provided to plaintiff by the Clerk of Court. If such waivers are filed, it is then recommended that plaintiff's claims against defendants Hepting, Schueler, Scarfo and Widdowson be dismissed without prejudice.

Consistent with the Magistrates Act, 28 U.S.C. Section 636(b)(1)(B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed twenty (20) days from the date of service to file objections to this report and recommendation.

/s/ ILA JEANNE SENSENICH
ILA JEANNE SENSENICH
Chief U.S. Magistrate

Dated: March 27, 1987

cc: The Honorable Paul A. Simmons
United States District Judge

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